Supreme Court of Michigan.

HACKLEY ET AL. *v.* HEADLEY.

Evidence of a custom is inadmissible where that to which the custom relates has been expressly provided for in the contract in terms different from the custom.

A contract for certain logs provided that they should be measured or scaled in accordance with the standard rules or scale in general use on Muskegon lake and river. *Held*, that the scale in general use at the time the scaling was required to be done, and not that in use at the time of making the contract, was the one intended.

Defendants, being indebted to plaintiff in a considerable amount, took advantage of his financial embarrassment, and refused to pay him unless he would receive in full a less sum than he claimed; and he, being in pressing need of the money, received the sum offered and gave a receipt in full. *Held*, distinguishing *Vyne* v. *Glenn*, 41 Mich. 112, not to be duress of goods.

ERROR to the Circuit Court of Kent county.

Smith, Nims, Hoyt & Erwin, for plaintiffs in error.

John C. Fitzgerald, for defendant in error.

The opinion of the court was delivered by

COOLEY, J.—Headley sued Hackley & McGordon to recover compensation for cutting, hauling and delivering in the Muskegon river a quantity of logs. The performance of the labor was not disputed, but the parties were not agreed as to the construction of the contract in some important particulars, and the amount to which Headley was entitled depended largely upon the determination of these differences. The defendants also claimed to have had a full and complete settlement with Headley, and produced his receipt in evidence thereof. Headley admitted the receipt, but insisted that it was given by him under duress, and the verdict which he obtained in the circuit court was in accordance with this claim.

1. The questions in dispute respecting the construction of the contract concerned the scaling of the logs. The contract was in writing, and bore date August 20th 1874. Headley agreed thereby to cut on specified lands and deliver in the main Muskegon river the next spring 8,000,000 feet of logs. The logs were to be measured or scaled by a competent person to be selected by Hackley & McGordon, "and in accordance with the standard rules or scales in general use on Muskegon lake and river," and the expense of scaling was to be equally borne by the parties.

The dispute respecting the expense of scaling related only to the board of the scaler. Headley boarded him and claimed to recover one-half what it was worth. Defendants offered evidence that it was customary on the Muskegon river for jobbers to board the scalers at their own expense, but we are of opinion this was inadmissible. If under the contract with the scaler he was to be furnished his board, then the cost of the board was a part of the expense of scaling, and by the express terms of the contract was to be shared by the parties. If that was not the agreement with him, Headley could only look to the scaler himself for his pay.

This is a small matter; but the question what scale was to be the standard is one of considerable importance. The evidence tended to show that at the time the contract was entered into scaling upon the river and lake was in accordance with the "Scribner rule," so called; but that the "Doyle rule" was in general use when the logs were cut and delivered, and Hackley & McGordon had the logs scaled by that. By the new rule the quantity would be so much less than by the one in prior use that the amount Headley would be entitled to receive would be less by some $2000; and it was earnestly contended on behalf of Headley that the scale intended, as the one in general use, was the one in general use when the contract was entered into. We are of opinion, however, that this is not the proper construction. The contract was for the performance of labor in the future, and as the scaling was to be done by third persons, and presumptively by those who were trained to the business, it would be expected they would perform their duties under such rules and according to such standards as were generally accepted at the time their services were called for. Indeed, such contracts might contemplate performance at times when it would scarcely be expected that scalers would be familiar with scales in use when they were made. It is true the time that was to elapse between the making of this contract and its performance would be but short, but if it had been many years the question of construction would have been the same; and if we could not suppose under such circumstances that the parties contemplated the scalers should govern their measurements by obsolete and perhaps now unknown rules, neither can we here. It is fair to infer that the existing scale was well known to the parties, and that if they intended to be governed by it at a time when it might have ceased to be used, they would have said

so in explicit terms. In the absence of an agreement to that effect, we must suppose they intended their logs to be scaled as the logs of others would be at the place and time of scaling.

2. The question of duress on the part of Hackley & McGordon in obtaining the discharge remains. The paper reads as follows:

"Muskegon, Mich., August 3, 1875.

"Received from Hackley & McGordon their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against Hackley & McGordon.

"JOHN HEADLEY.

"Witness: THOMAS HUME."

Headley's account of the circumstances under which this receipt was given is in substance as follows: On August 3d 1875, he went to Muskegon, the place of business of Hackley & McGordon, from his home in Kent county, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of $6200, estimating the logs by the Scribner scale. He had an interview with Hackley in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some $1400 which Headley should allow. Headley did not admit these payments, and denied his liability for them if they had been made. Hackley told Headley to come in again in the afternoon, and when he did so Hackley said to him: "My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you $4000. I will give you our note for $4000." To this Headley replied: "I cannot take that; it is not right, and you know it. There is over $2000 besides that belongs to me, and you know it." Hackley replied: "That is the best I will do with you." Headley said: "I cannot take that, Mr. Hackley," and Hackley replied, "You do the next best thing you are a mind to. You can sue me if you please." Headley then said: "I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably be ruined financially, because I have made no other arrangement to get the money only on this particular matter." Finally, he took the note and gave the

receipt, because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him, or paper by means of which the money might be obtained.

If this statement is correct, the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties and known by them to be owing to Headley beyond the sum received, was without consideration and ineffectual. But was it a receipt obtained by duress? That is the question which the record presents. The circuit judge was of opinion that if the jury believed the statement of Headley they would be justified in finding that duress existed; basing his opinion largely upon the opinion of this court in *Vyne* v. *Glenn*, 41 Mich. 112.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is, if anything, duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.

The leading case involving duress of goods is *Astley* v. *Reynolds*, 2 Strange 915. The plaintiff had pledged goods for 20*l.*, and when he offered to redeem them, the pawnbroker refused to surrender them unless he was paid 10*l.* for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. "This," say the court, "is a payment by compulsion: the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again." The

principle of this case was approved in *Smith* v. *Bromley*, 2 Doug. 695 n., and also in *Ashmole* v. *Wainwright*, 2 Q. B. 837. The latter was a suit to recover back excessive charges paid to common carriers who refused until payment was made to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances: *Harmony* v. *Bingham*, 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid: *Scholey* v. *Mumford*, 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays: *Chase* v. *Dwinal*, 7 Me. 134. Other cases in support of the same principle are *Shaw* v. *Woodcock*, 7 B. & C. 73; *Nelson* v. *Suddarth*, 1 H. & Munf. 350; *White* v. *Heylman*, 34 Penn. St. 142; *Sasportas* v. *Jennings*, 1 Bay 470; *Collins* v. *Westbury*, 2 Id. 211; *Crawford* v. *Cato*, 22 Ga. 594.

So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action: *Chandler* v. *Sanger*, 114 Mass. 364. See *Spaids* v. *Barrett*, 57 Ill. 289. Nor is the principle confined to payments made to recover goods: it applies equally as well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to: *Bates* v. *Ins. Co.*, 3 Johns. Cas. 238; or a creditor withholds his certificate from a bankrupt: *Smith* v. *Bromley*, Doug. 695. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it: *Beckwith* v. *Frisbie*, 32 Vt. 559; *Adams* v. *Reeves*, 68 N. C. 134; *Briggs* v. *Lewiston*, 29 Me. 472; *Grim* v. *School District*, 57 Penn. St. 433; *First Nat. Bank* v. *Watkins*, 21 Mich. 483.

But where the party threatens nothing which he has not a legal right to perform, there is no duress: *Skeate* v. *Beale*, 11 Ad. & E. 983; *Preston* v. *Boston*, 12 Pick. 14. When therefore a judgment-creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress: *Wilcox* v. *Howland*, 23 Pick. 167. Many other

cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so: notably *Atlee* v. *Backhouse*, 3 M. & W. 633; *Hall* v. *Shultz*, 4 Johns. 240; *Silliman* v. *United States*, 101 U. S. 465.

In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendant's conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

The case of *Vyne* v. *Glenn*, 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that

plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which it is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that, an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

These views render a reversal of the judgment necessary, and the case will be remanded for a new trial with costs to the plaintiff's in error.

The rule laid down by the court in this case, that "duress exists where one by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will," recognising, as it does, the fact that such duress may exist as well with reference to the goods or legal rights of a party, as to his person, is at once so reasonable and just, that the only wonder is that it has not always been laid down in terms, equally clear and comprehensive.

The rule laid down in the leading case of *Astley* v. *Reynolds*, 2 Strange 915; s. c., 2 Barnard, K. B. 40, in the year 1731, notwithstanding it was said in *Hull* v. *Schultz*, 4 Johns. 245, that this case was overruled by *Knibbs* v. *Hall*, 1 Esp. 84, is believed to be well settled upon reason as well as authority. Besides the cases cited by the court in the principal case, see *Lafayette, &c., R. R. Co.* v. *Pattison*, 41 Ind. 323; *Bradford* v. *City of Chicago*, 25 Ill. 411; *Pemberton* v. *Williams*, 87 Id. 16; *Preston* v. *Boston*, 12 Pick. 7; *Town of Lionier* v. *Ackerman*, 46 Ind. 552; *Briggs* v. *Boyd*, 56 N. Y. 289; 1 Story on Contr. (5th ed.) sec. 510, where the cases are collected; Ewell's Lead. Cases 785, 786, and the cases there cited.

The principle of *Astley* v. *Reynolds* is well exemplified in *Pemberton* v. *Williams*, *supra*. In that case it was held, that where the assignee of a purchaser of land, who has contracted to sell the land to another who demands to see his deed therefor, is compelled to pay the original vendor more than is due him, in order to get a deed to satisfy his vendee, and the payment is made under protest, it is a fair question of fact for the jury, whether the payment is not involuntary and made under a sort of moral duress; and if so, the excess above the real sum due may be recovered back in assumpsit under the common counts.

Where instead of the payment of money, instrument in writing is given, under the same circumstances in other respects as are held to warrant a recovery of money, a distinction is made by some cases, one class of cases holding such circumstances not to constitute duress, while other cases hold that under

certain circumstances such compulsion may constitute such duress as to avoid the instrument. The case of *Skeate* v. *Beale*, 11 Ad. & Ell. 983; s. c., Ewell's Lead. Cas. 775, well illustrates this distinction. In this case, Lord DENMAN, C. J., in delivering the judgment of the court, said: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former, the law is laid down in 2 Inst. 483, and Shepherd's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to. the person and duress of goods. The former is a construing force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of fairness which the law requires all to exert."

In *Atlee* v. *Backhouse*, 3 M. & W. 645, where the cases are quite fully collected by counsel, Lord ABINGER, C. B., said: "All the cases that have been cited, if they are examined properly, and without the bias that naturally belongs to counsel who examine them in support of their client's case, will be found to be cases of this nature, when property has been unlawfully seized, or unlawfully detained, for the purpose of enforcing the payment of money that was not due. In all these cases (and there is a great series of them) the party against whom the goods have been wrongfully seized or detained is entitled, after payment of the money, to bring an action for money had and received, to try the right; as in the case of tolls, where a man seizes property for toll and exacts more than is due, the party is entitled to bring an action for money had and received. * * * In all these cases it will be found that the seizure and detention were for the purpose of exacting money." In the same case (p. 642), PARKE, B., said: "You will find that the old cases which say that duress of goods will avoid the agreement are not law; there may be duress of the person, but not of the goods. It certainly seems to me that this was not a voluntary payment, and that unless there was a consideration for it, the plaintiff's are entitled to recover; but you must show that there was no consideration." Again, on p. 650, he said: "There is no doubt of the proposition laid down by Mr. *Erle*, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is one case in Viner's Abridgment to the contrary (9 Vin. Abr. 317; *Duress*, B. 3; 1 Roll. Abr. 587; 20 Ass. 14), that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Shepherd's Touchstone (p. 61); but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."

The distinction taken in *Skeate* v. *Beale*, and *Atlee* v. *Backhouse*, may be considered as settled in England, and has received some support in the United States. See *Hazelrigg* v. *Donaldson*, 2

Met. (Ky.) 445; also *Jones* v. *Bridge*, 2 Sweeny 431; *Burr* v. *Burton*, 18 Ark. 233.

The clear tendency of American authority, however, is against this distinction, and in favor of holding the giving of a written instrument instead of paying the money, when the other requisite circumstances concur, to be an immaterial circumstance. The leading case upon this side of the question is *Sasportas* v. *Jennings*, 1 Bay (So. Car.) 470; s. c., Ewell's Lead. Cas. 782, decided in 1795, which lays down the rule that duress of goods will avoid a written instrument if either of these essentials is wanting: 1. Ability in the person or persons imposing the duress to make recompense. 2. A prompt and effectual method to compel satisfaction. See also, *Collins* v. *Westbury*, 2 Bay 211; *Bingham* v. *Sessions*, 14 Miss. 22; *Nelson* v. *Suddarth*, 1 Hen. & Munf. 350; *Crawford* v. *Cato*, 22 Ga. 594; *Miller* v. *Miller*, 68 Penn. St. 493; *White* v. *Heylman*, 34 Id. 142; *Spaids* v. *Barrett*, 57 Ill. 293; *Bennett* v. *Ford*, 47 Ind. 264; *Modlin* v. *N. W. Turnpike Co.*, 48 Id. 492; Ewell's Lead. Cases 787.

The general tendency of the American courts seems clearly to be towards a liberal extension of the common-law rules as to what constitutes duress. In the principal case, it is conceded by the court that, assuming the correctness of Headley's statement of the circumstances claimed to constitute duress, "the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties, and known by them to be owing to Headley beyond the sum received, was without consideration, and ineffectual." Had money passed from the plaintiff to the defendants, instead of a receipt for the amount remitted from the sum justly due, on the authority of *Astley* v. *Reynolds* and *Pemberton* v. *Williams*, it would seem that it would have been a question of fact for the jury whether such a payment was not "involuntary, and made under a sort of moral duress;" and, if so, the excess would have been recoverable. Now, in this case, no money passed from the plaintiff to the defendant, but a receipt in full was given; and it would seem to have been a proper question to submit to the jury, on the authority of *Sasportas* v. *Jennings* and other cases disregarding the distinction between written instruments and payments of money, whether the receipt was not given by the plaintiff "under circumstances which deprived him of the exercise of free will;" and, if it was, that it ought to be regarded as having been given under a species of duress. From the report of the case, though the form in which the question was submitted to the jury is not stated, such appears to have been their finding. If embracing the opportunity afforded by the pecuniary embarrassment of the plaintiff, and withholding the amount due the plaintiff for the mere purpose of compelling a settlement for less than was actually due, was an unlawful act; and if it did in fact deprive the plaintiff of the exercise of his free will, and force him to accept in full satisfaction less than was due him, as appears to have been found by the jury, it is difficult to see why the case does not fall within the definition quoted. If the jury did not find generally that the receipt was given under circumstances which deprived plaintiff of the exercise of free will, there would be great force in the argument that the defendants, not having caused or contributed to the plaintiff's embarrassment, the duress was to be found exclusively in defendants' failure to meet promptly their pecuniary obligations; but, so far as the report of the case shows (though of course the record may disclose facts not appearing in the report which would modify this

statement), this does not appear to have been the finding of the jury, but matter of argument on the part of the court. Doubtless, the finding was that all the circumstances narrated collectively constituted duress. If the definition given by the court is correct, duress is a relative term; and it cannot be said, as matter of law, that any particular compulsion constitutes duress as to all persons, or even as to the same person under all circumstances. What constitutes duress is believed to be a mixed question of law and fact, depending upon the circumstances of the particular case in question, and no good reason is perceived why the pecuniary embarrassments of the plaintiff should not be considered in determining whether he was deprived of the free exercise of his will, whether that embarrassment was caused by the defendants or not, for the reason that, if thus embarrassed, the free exercise of his will would be more easily overcome. Whether we are right or not in the view we have taken of this question, the case is an important and interesting one, and it is to be regretted that the very able court by whom the judgment was rendered could not have seen its way consistent with the rules of law to remedy what they appear to concede to be an act of injustice. It is, however, possible that, in the view we have taken of this case, we may have illustrated the saying that "hard cases make bad law."

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

JOSEPH UHL ET AL. *v.* JOHN HARVEY.

The general liability of a person as a partner, who is not so in fact, arises from the fact that he has held himself out as such to the world, or permitted others to do so, and that by reason thereof he is estopped from denying that he is one as against persons who have in good faith dealt with the firm, or with the person so held out as a member of it.

It is an absolute requirement that a retiring partner shall give proper notice of his withdrawal, and failing to do so, from whatever cause, he must suffer the consequences.

It is immaterial whether the failure to give proper notice of retirement is wilful or negligent, or arose from causes enforced and beyond control.

The retiring partner escapes continued liability, not by ceasing to hold himself out as a partner, but by giving affirmative notice of the dissolution or of his withdrawal.

One whose membership in a business partnership has been publicly advertised in the community where the business is prosecuted, owes a duty on retiring to give notice thereof, not merely to the customers who have had actual transactions, but to the public who may be misled into giving future credit, on the supposed responsibility of him who retires.

Appellant's name was signed with his copartners' names to a notice of the formation of a partnership published in a daily newspaper; after the publication had continued some time it was discontinued, but the business of the firm continued. Under such a state of facts, there is no legal presumption that the appel-